

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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THE NEW YORK TIMES COMPANY, CITY &
SUBURBAN DELIVERY SYSTEMS, INC., CITY
AND SUBURBAN DELIVERY SYSTEMS, INC.
JANUARY 2009 SEVERANCE PAY PLAN FOR
COMPLAINT ELIGIBLE EMPLOYEES
REPRESENTED BY THE NEWSPAPER AND
MAIL DELIVERERS' UNION OF NEW YORK
AND VICINITY, PLAN ADMINISTRATOR OF
THE CITY AND SUBURBAN DELIVERY
SYSTEMS, INC. JANUARY 2009 SEVERANCE
PAY PLAN FOR ELIGIBLE EMPLOYEES
REPRESENTED BY THE NEWSPAPER AND
MAIL DELIVERERS' UNION OF NEW YORK
AND VICINITY, and ERISA MANAGEMENT
COMMITTEE OF THE NEW YORK TIMES
COMPANY,

Docket No. 12-cv-5430 (AKH)

Plaintiffs,

vs.

NEWSPAPER AND MAIL DELIVERERS' UNION
OF NEW YORK AND VICINITY, ENRIQUE
GRADOS, DJEVALIN GOJANI, CHRISTOPHER
FABIANI, RICHARD ATKINS, RAIMON
MORAN, JOHN CASSARO, MUNIR
FAHREDDINE, and WILLIE MILES,

Defendants,

NATIONAL LABOR RELATIONS BOARD

Intervenor.

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**SUPPLEMENTAL REPLY OF DEFENDANT NEWSPAPER AND MAIL DELIVERERS'
UNION OF NEW YORK AND VICINITY TO INTERVENOR NATIONAL LABOR
RELATIONS BOARD'S MOTION TO STAY**

I. INTRODUCTION

The Newspaper and Mail Deliverers' Union of New York and Vicinity ("NMDU" or "Union") is vitally interested in the outcome of this action. At the same time, it does not have the wherewithal to fully participate in the action and is concerned that it is being subjected to duplicative litigation, with potentially of inconsistent results. Accordingly, the NMDU, submits this brief in support of the motion of the National Labor Relations Board ("NLRB" or "Board") to stay these proceedings. At the same time, it admonishes the Board to complete its proceedings with respect to the buyout's in question.

The NMDU provided the National Labor Relations Board through the Compliance Officer in the Board's Region 2, with evidence and information establishing that 134 of the 140 buyouts that are subject of this action brought by the New York Times and related entities ("Times") have been paid in accordance with the Board's decision. Based on that evidence and information, the Board is in a position right now to name the former Times' employees entitled to the remaining six buyouts.

The Board should do so forthwith. The financially strapped NMDU cannot afford, and should not be required, to proceed with litigation before this Court, with the risk of inconsistent determinations as to who is entitled to a buyout. The NLRB should proceed to decide this matter, and the Court should not further intrude in its proceedings.

II. THE COURT LACKS JURISDICTION TO HEAR THIS MATTER

(a) The Statue of Limitations for a Section 301 Claim has Expired

This Court has no viable basis to assert jurisdiction over this action. Section 301 of the Labor Management Relations Act ("LMRA"), 29 USC §185, gives this Court concurrent jurisdiction with the NLRB, in appropriate circumstances. Such circumstances do not exist here

because at no time prior to August 25, 2017 has any of the defendants seeking buyouts asserted a Section 301 claim.

The defendants filed unfair labor practice charges with the Board between 2008 and early 2012. They did not at time(s) bring a Section 301 claim. The Complaint in this action, was filed by The Times on July 13, 2012. Neither the Times or the defendants asserted Section 301 claims at that time. The first claim under Section 301 came in the August 25, 2017 in opposition papers filed on behalf of six defendants in this action.

The statute of limitations for Section 301 claims is the same as the statute of limitations for NLRB charges, 180 days from the time the person alleging a violation of Section 301 knew, or should have known, of the action(s) giving rise to Section 301 jurisdiction. In this case, the unfair labor practice charges were filed between 2008 and early 2012. At the time of their filing a Section 301 action could have been timely filed, but it wasn't filed. The law is clear that the pendency of an unfair labor practice proceeding does not toll the filing of a Section 301 complaint.

In Kavowras v. New York Times Co., 328 F.3d 50, 53 (2d Cir. 2003), plaintiff filed an unfair labor practice charge with the Board in July 1998 alleging that this Union failed to represent him fairly in a January 1998 arbitration. Two years later, Kavowras filed a hybrid federal claim in against the Union and the Times under Section 301 asserting *inter alia* a breach of the Union's duty of fair representation at the January 1998 arbitration. The Kavowras court held that where a plaintiff has filed a charge with the NLRB alleging the same misconduct that is pled in a subsequent Section 301 complaint, the filing of the NLRB charge established that the plaintiff had actual knowledge of the Section 301 breach and thus the portion of the complaint alleging a breach of the Union's duty of fair representation with respect to the January 1998

arbitration was time-barred. In other words, when an unfair labor practice charge is filed, the cause of action for a potential Section 301 claim begins to accrue. There is no tolling during the pendency of the NLRB proceedings. *Id.* 55; *see also Howell v. Vazquez*, 643 F. App'x 60, 61 (2d Cir. Mar. 17, 2016) (“Howell filed a charge ... with the [NLRB] challenging the [u]nion's decision not to arbitrate nine months before he filed his Section 301 complaint. Accordingly, his claim had accrued at the time he filed his NLRB charge because he knew of the alleged breach.”); *Ode v. Terence Cardinal Cooke (HCC)*, No. 08-CV-1528, 2008 WL 5262421, at *2 (S.D.N.Y. Dec. 12, 2008) (finding a claim for breach of the duty of fair representation based on union's refusal to demand arbitration on the employee's behalf time-barred because the claim accrued when the employee filed an NLRB charge). As such, Section 301 of the LMRA cannot be used as a viable basis for this Court to assert jurisdiction over this matter.

(b) This Court Does Not Have Jurisdiction of This Action Under ERISA

The NMDU believes that jurisdiction does not exist here under the Employee Retirement Income Security Act (“ERISA”) as asserted in the Complaint filed by the Times and as may be asserted by the Board. The buyouts and severance payments under the Plan are one shot lump sum payments. As such, the Plan is not an ERISA-regulated plan that is subject to the jurisdiction of this Court. Such ERISA-regulated plans involve administration of ongoing benefits with rules, reporting requirements, etc.

In *Fort Halifax Packing Co., Inc. v. Coyne*, 482 U.S. 1 (1987), the Supreme Court considered whether a Maine statute requiring employers to pay certain terminated employees severance dependent on years of service was preempted by ERISA. The primary issue considered by the Court was whether the Maine statute constituted an employee benefit plan under ERISA. The Court stated that an employee benefit package or program will only

constitute a “plan” under ERISA if it “requires an ongoing administrative program to meet the employer’s obligation.” Fort Halifax, 482 U.S. at 11. On that basis, the Court concluded that the obligation to pay a one-time lump sum benefit triggered by a single event does not constitute a “plan” under ERISA. See James v. Fleet/Norstar Fin. Grp., Inc., 992 F.2d 463, 464–66 (2d Cir.1993) (The Second Circuit determined that a similar one-time employer promise to provide sixty days’ pay to employees discharged in a “plant closing” was not an employee welfare benefit plan governed by ERISA); See also Okun v. Montefiore Medical Center, 793 F.3d 277 (2d Cir. 2015) (The Second Circuit considered whether the employer’s severance program constituted an “ongoing administrative program” covered by ERISA). In the Okun case, the Court found the severance program was covered by ERISA because it had been in place for several decades, covered a broad class of employees, and required individualized review whenever an employee was terminated. The Okun plan required “long term coordination and control” by the Employer. The factors outlined in Okun, are absent in this case. Thus, the Plan at issue before this Court is not pre-empted by ERISA.

Assuming, in the alternative, that the Plan is an ERISA Plan, the charging parties knew between 2008 and early 2012 at the latest, that they had not been determined eligible to receive a buyout under the Plan. There is no evidence that defendants filed appeals with the Trustees of the Plan and, if so, whether and when the Trustees issued rulings on their appeals. What is clear is that they knew between 2008 and 2012 that they had not gotten a buyout, and that is when the ERISA statute of limitations began to run. The ERISA limitations period in these circumstances is three years from the time the affected individuals had actual knowledge of the alleged breach of the obligation to pay them a buyout. See ERISA, Section 1113, 29 U.S.C.A. §1113.

Nor is the ERISA limitation period tolled by the pendency of the NLRB proceedings. Section 1113 of ERISA is clear that an action cannot be commenced after three years from the earliest date on which the party bringing the action had notice of the alleged breach or violation. The statute explicitly refers to tolling in the specific cases of fraud or concealment, which have not been alleged in the Complaint.

III. CONCLUSION

For all of the foregoing reasons, the NMDU continues to support the NLRB's motion to stay this action.

Dated: September 20, 2017
New York, New York

Respectfully Submitted,

MEYER, SUOZZI, ENGLISH & KLEIN, P.C.

/s/ Irwin Bluestein

/s/ Max H. Sicherman

Irwin Bluestein

Max H. Sicherman

1350 Broadway, Suite 501

New York, New York 10018

212-239-4999

*Attorneys for Newspaper and Mail Deliverers'
Union of New York and Vicinity*

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AFFIRMATION OF SERVICE

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I, Max Sicherman, declare under penalty of perjury that I served a copy of the attached
Supplemental Reply of Defendant Newspaper and Mail Deliverers' Union of New York and

Vicinity to Intervenor National Labor Relations Board's Motion to Stay, upon the following parties in this case by first-class mail:

Raimon Moran
c/o Joel Wexler, Esq.
P.O. Box 220170
Great Neck, NY 11022

John Cassaro
P.O. Box 304
Central Valley, NY 10917

All other parties in this case were served electronically by the Court's CM/ECF system.

Dated: September 20, 2017

Respectfully Submitted,

MEYER, SUOZZI, ENGLISH & KLEIN, P.C.

/s/ Max H. Sicherman

Max H. Sicherman

1350 Broadway, Suite 501

New York, New York 10018

212-239-4999

*Attorneys for Newspaper and Mail Deliverers'
Union of New York and Vicinity*